

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP1371-CR
2015AP1372-CR**

**Cir. Ct. Nos. 2012CF318
2012CF472**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUCAS NELSON,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Walworth County: JOHN R. RACE and DAVID M. REDDY, Judges. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. In these consolidated matters, Lucas Nelson appeals from judgments of conviction entered upon a jury's guilty verdicts and

from an order denying his postconviction motion for a new trial.¹ Nelson argues that the postconviction court improperly determined *nunc pro tunc* that Nelson was competent to represent himself at trial. We disagree and affirm.

¶2 While patrolling the parking lot at Alpine Valley Music Theater after a Phish concert, Walworth County Sheriff's Department Deputy Daniel Long saw a glass jar filled with marijuana inside Nelson's car. Nelson's passenger told Long they intended to give the marijuana to the Phish band members. Nelson was charged with possession with intent to deliver tetrahydrocannabinols (THC) and released on felony bond.

¶3 Less than two months later, having received a citizen complaint concerning Nelson's behavior, Vilas County deputies approached Nelson as he sat at a picnic table near a library. During their contact and within earshot of nearby citizens, Nelson became loud and yelled profanities at the officers. Nelson was arrested and charged in Walworth County with felony bail jumping on the theory that he violated his bond conditions by engaging in the crime of disorderly conduct.

¶4 Nelson chose to represent himself and in November 2012 executed a signed form waiving his right to counsel. After first meeting Nelson, District Attorney Daniel Necci asked the trial court to order a competency evaluation, stating that during their conversation, Nelson went on for "a good twenty minutes about conspiracies, the Central Intelligence Agency, the FBI, the national news

¹ The Honorable John R. Race presided at Nelson's jury trial and entered the judgments of conviction. The Honorable David M. Reddy heard and decided Nelson's postconviction motion.

media.” Though Nelson had recently been found competent in Vilas County, the trial court ordered a competency evaluation, observing that “people can come in and out of competence.”

¶5 In February 2013, the competency evaluator filed a report opining that Nelson was competent to stand trial. The evaluator, a psychologist, reported that Nelson did not exhibit any overt signs of significant mental illness, disorganization or other psychosis, or mood disorder. The report stated that Nelson understood the purpose of the evaluation and case-specific information, including the State’s potential evidence. Knowing that the court and parties would receive the report, Nelson was reluctant to discuss the case in detail out of concern it might affect his defense. Nelson told the evaluator he wanted to proceed pro se and expressed confidence in his ability to navigate the courtroom and maintain an appropriate demeanor. Nelson reported he had prior experience representing himself in a case out of Vilas County and succeeded in getting those charges dismissed.

¶6 Nelson represented himself at his jury trial and was found guilty of both charges. With the assistance of counsel, Nelson filed a postconviction motion asserting that at the time of his jury trial, he was incompetent to represent himself. A new judge, the Honorable David M. Reddy, presided at the postconviction hearing to determine nunc pro tunc whether Nelson was competent to waive counsel in favor of self-representation. The State presented two witnesses, Necci and Long. Both testified that they did not observe Nelson make any delusional statements during his jury trial and that he worked from a notebook and seemed prepared. Necci explained that he raised the issue of Nelson’s competency because he considered himself ethically bound to bring to the court’s attention any “whiff of potential incompetency” and that in retrospect, he “was

being very overly cautious.” Necci said they discussed plea offers at one point and Nelson expressed an understanding of the charges and what the State would have to prove.

¶7 Nelson testified that prior to and at the time of his arrest, he was being treated for ADHD and depression and that his ADHD makes it difficult for him to focus, particularly during times of stress. He stated he ran out of his prescribed ADHD medication about two weeks before trial and, for financial reasons, did not obtain a refill until the day before trial. He testified he tried but was unable to prepare in the weeks leading up to trial because he would become overwhelmed. Nelson testified there were times he was able to focus during the trial, but in retrospect, his medication issues sometimes made it hard to concentrate. He stated there were questions he intended, but forgot, to ask and planned tasks he forgot to accomplish at trial.

¶8 Jayme N., Nelson’s ex-wife, testified that she observed strange behavior by Nelson in the six months before trial. On one occasion, Nelson called her at 1:00 a.m. and said, “[Y]ou need to come get me ... they’re after me.” When Jayme arrived to pick him up, he was standing on a frozen lake, wearing no jacket, and claiming that police were everywhere. She also testified that Nelson made statements indicating his belief that the FBI or CIA was listening in on his phone calls and once commented that he “was sitting on the couch talking to Jesus.”

¶9 After two hearings, the postconviction court found nunc pro tunc that Nelson was competent to represent himself at the time of trial. Nelson appeals.

¶10 Criminal defendants have a constitutional right to self-representation. *State v. Klessig*, 211 Wis. 2d 194, 201-03, 564 N.W.2d 716

(1997). “[P]ersons of average ability and intelligence are entitled to represent themselves,” and should be denied this right “only where a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist.” *Pickens v. State*, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980), *overruled on other ground by Klessig*, 211 Wis. 2d at 206. When a defendant seeks to represent him or herself, the circuit court should conduct an on-the-record examination to determine if the defendant “possesses the minimal competence necessary to conduct his own defense,” and is to consider factors including “the defendant’s education, literacy, fluency in English, and any physical or psychological disability which may significantly affect [the defendant’s] ability to communicate a possible defense to the jury.” *Pickens*, 96 Wis. 2d at 569.

¶11 If a trial court fails to independently determine a defendant’s competence to proceed pro se, and the defendant claims after trial he was not competent to represent himself, the circuit court should determine whether it can make an adequate and meaningful nunc pro tunc inquiry into the question of whether the defendant was competent to proceed pro se. *Klessig*, 211 Wis. 2d at 213. If so, the court must hold an evidentiary hearing. *Id.*

¶12 As a preliminary matter, the parties dispute the standard of review to be applied to the postconviction court’s retrospective determination that Nelson was competent to represent himself at the time of trial. The State argues that under established precedent, the postconviction court’s competency determination is entitled to deference. *See, e.g., State v. Marquardt*, 2005 WI 157, ¶21, 286 Wis. 2d 204, 795 N.W.2d 878; *Pickens*, 96 Wis. 2d at 569-70. Nelson contends that because a new judge presided at his postconviction hearing, this court should review its determination de novo. In support, he cites to a court of appeals

decision which was overruled by the Wisconsin Supreme Court after the parties submitted their briefs. *See State v. Smith*, 2014 WI App 98, 357 Wis. 2d 582, 855 N.W.2d 452, *rev'd*, 2016 WI 23, 367 Wis. 2d 483, 878 N.W.2d 135.

¶13 In *Smith*, 367 Wis. 2d 483, ¶¶34, 58, our supreme court held that a postconviction court's retrospective competency determination is reviewed for an erroneous exercise of discretion. In overruling the court of appeals decision, *Smith* explicitly rejected the notion that where the postconviction judge did not also preside at trial, no deference need be afforded the postconviction court's retrospective determination regarding the defendant's time-of-trial competence. *Id.*, ¶¶24, 29-34. Therefore, we will review the postconviction court's determination that Nelson was competent to proceed pro se for an erroneous exercise of discretion.²

¶14 We conclude that the postconviction court properly determined nunc pro tunc that Nelson possessed the minimal competence necessary to represent himself. It is undisputed that Nelson is of at least average intelligence, has a GED or HSED, and is literate and fluent in English. *See Pickens*, 96 Wis. 2d at 569. In terms of pretrial facts, the postconviction court considered that Nelson executed a

² In *State v. Smith*, 2016 WI 23, 367 Wis. 2d 483, 878 N.W.2d 135, the Wisconsin Supreme Court stated that in reviewing a circuit court's "competency to proceed pro se determination [we will] uphold that finding unless it is totally unsupported by facts in the record." *Id.*, ¶29. The *Smith* Court also characterized the test as akin to the clearly erroneous standard of review. *See id.*, ¶¶27-28. For ease and seeing little practical difference between the tests on the facts of this case, we will apply the clearly erroneous standard.

The parties also dispute the applicable burden of proof. Nelson argues it was the State's burden to prove he was competent to represent himself, while the State asserts that due to the discretionary nature of the postconviction court's decision, neither party bore any burden. The postconviction court agreed to place the burden on the State. We will assume without deciding that the postconviction court properly placed the burden on the State to retrospectively prove Nelson's competence.

signed form waiving his right to counsel in which he not only acknowledged his understanding of the rights waived and dangers and disadvantages of proceeding pro se, but also asserted he did not “have physical or psychological disabilities that may affect my ability to understand what is happening in court or communicate my position or views on this case to the court.” Though Necci had concerns about Nelson’s competency, the postconviction court found credible Necci’s testimony that Nelson’s statements were not delusional. This is supported by the competency report stating that Nelson did not exhibit signs of delusional thinking or behavior. The postconviction court also considered that Nelson provided the evaluator with a logical and rational explanation as to why he wanted to proceed pro se.

¶15 The postconviction court also determined that Nelson’s conduct at trial supported a finding that he was competent to proceed pro se. Nelson came prepared with notes. He asked questions and made arguments pointing to the discrepant reports concerning the weight of the THC and the lack of certain evidence associated with drug delivery. He made objections, argued jury nullification, and exhibited no delusional thoughts. The postconviction court determined that Nelson’s retrospective testimony concerning his perceived lack of focus at trial did not constitute a specific problem or disability that prevented Nelson from presenting a meaningful defense. The postconviction court’s well-explained decision is supported by the record.

¶16 Nelson argues that his “rambling” trial testimony demonstrates his lack of competence. We disagree. That the trial court cut off a portion of Nelson’s testimony as “rambling” reflects its impatience with an unlearned pro se defendant’s failure to comply with the rules of evidence and procedure. The testimony to which Nelson points is not fairly characterized as incoherent

rambling. Though legally irrelevant, Nelson’s statements were made with the purpose to sway the jury to his favor. As the postconviction court observed, the trial court will similarly block an attorney’s attempt to elicit irrelevant or cumulative evidence.

¶17 We also reject Nelson’s argument that his performance in questioning the State’s witnesses manifests his incompetence to proceed pro se. Nelson’s questions of Long related to his theory of defense, that he did not intend to deliver the THC in his possession.³ Nelson suggests that his inability to navigate the rules of evidence so as to present admissible evidence of his passenger’s statement to Long evinces his incompetence. However, technical legal knowledge is not relevant in assessing a defendant’s ability to represent himself. *Marquardt*, 286 Wis. 2d 204, ¶60; *Pickens*, 96 Wis. 2d at 568. Insofar as Nelson forgot to ask certain questions at trial, the postconviction court found that this failure was not attributable to Nelson’s need to catch up on his medication. This finding is not clearly erroneous. See *Smith*, 367 Wis. 2d 483, ¶¶29-30.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

³ For example, the point of Nelson’s question to Long about the criteria for arrest was clarified by his subsequent and more artful inquiry asking, “Where exactly... do you draw the line between simple possession and go to intent to deliver?” Nelson wanted to elicit testimony regarding the practical difference between the lesser crime he thought the State had established and the greater crime with which he was charged. Similarly, Nelson brought up the subject of medical marijuana not to establish a legally invalid defense, but to rebut Long’s testimony that it was out of the ordinary for someone to possess such a large quantity of THC merely for personal use, and in order to explain certain recorded telephone calls.

